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No. 04-1363

In The Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. JACK J. GRYNBERG,

Petitioner,

v.

PRAXAIR, INC. and
NIELSON & ASSOCIATES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

NIELSON & ASSOCIATES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Nielson & Associates, Inc. submits that the following questions more accurately reflect the issues presented by the ruling below:

1) Whether the jurisdictional bar of 31 U.S.C. §3730(e)(4)(A) applies to the Relator's Complaint when the Relator has relied on official documents/decisions in the public domain?

2) Whether a Relator may be an original source under 31 U.S.C. §3730(e)(4)(B) when the only knowledge he has gained is from public sources and he has no direct and independent knowledge of the information?

3) Whether a Court that lacks subject matter jurisdiction under the False Claims Act has jurisdiction to award attorney fees under 31 U.S.C. §3730(d)(4)?

4) Whether a Defendant who prevails in a false claims act case due to lack of subject matter jurisdiction of the Relator is a prevailing party under 31 U.S.C. §3730(d)(4)?

RULE 29.6 STATEMENT

Nielson & Associates, Inc. is a Wyoming Corporation which does not have any parent or subsidiary corporations. No other corporations own any interest in it nor does it own any interest in any other corporation.

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BRIEF IN OPPOSITION

Respondent Nielson & Associates, Inc. respectfully requests that the Court deny the Petition for a Writ of Certiorari in its entirety.

COUNTER STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Parties

Nielson & Associates, Inc. ("Nielson") is a privately-held Wyoming Corporation which produces and sells oil and gas from federal and non-federal lands. Nielson produces oil, natural gas, and carbon dioxide ("CO_2") from the McCallum and South McCallum Units (collectively the "McCallum Fields") in northern Colorado, pursuant to leases originally between Conoco, Inc. ("Conoco") and the United States. In 1994, Nielson purchased Conoco's interests in the McCallum Fields.

Praxair, Inc. ("Praxair") is a Delaware Corporation that among other things, purchases, processes, purifies, and sells industrial gases. Praxair owns the plant which purifies and converts Nielson's raw CO_2 from the McCallum Fields into liquid suitable for beverages, food processing, and other uses, and also makes dry ice. Praxair purchased CO_2 from Nielson pursuant to a June 1983 Agreement for the Sale and Purchase of Carbon Dioxide as subsequently amended (the "Agreement"). Praxair's predecessor in the plant was Liquid Carbonics Corporation, Inc. which Praxair acquired in 1996.

Neither Praxair nor its predecessor Liquid Carbonics Corporation ("LLC") have ever been affiliated with Nielson

or its predecessor, Conoco. LCC and Conoco were not conducting business in any substantial way prior to negotiating the Agreement. Nielson has no material relationship with Praxair other than the Agreement.

Petitioner Grynberg has no connection to the matters at issue other than this lawsuit. Neither Nielson nor Praxair, nor their predecessors in interest, have ever employed Grynberg or engaged in business with him. Grynberg does not have, nor has he ever had, any "inside" information regarding Nielson, Praxair, Conoco, or LLC, or the CO_2 production involved in this proceeding. The United States, the real party in interest, declined to intervene.

B. The 1983 Agreement for the Sale and Purchase of Carbon Dioxide

For many years, Conoco, Nielson's predecessor, extracted and sold oil from the McCallum Fields and simply vented to the atmosphere (with the approval of federal regulatory authorities) raw CO_2 gas that was produced in conjunction with the oil. Since there were no close pipelines to transport the CO_2 to locations where it could be sold, there were no customers for the CO_2.

Conoco entered into a June 3, 1983 Agreement for the Sale of Carbon Dioxide ("Agreement") with LCC, Praxair's predecessor. Under the Agreement, LCC was obligated to construct a plant to process raw CO_2 gas produced and delivered by Conoco in order to purify and convert it into liquid CO_2 which is saleable for beverages, food processing and other uses. Conoco owned the CO_2 until the plant tailgate, at which point it was purchased by LCC.

The Conoco/LCC Agreement allowed Conoco to receive waste gas from two plant vents, but Conoco determined that only one of the vents yielded anything potentially sellable (i.e., hydrocarbon condensates) and therefore installed only one return line.

In 1992, LCC designed and installed a dry ice manufacturing facility at the plant. LCC initially intended to salvage, rather than vent, the CO_2 that inevitably turns to gas when making dry ice, but that proved economically infeasible because of the low volume and intermittent production.

Processing McCallum Fields' CO_2 into ultra-pure liquid CO_2 and dry ice necessarily involves shrinkage. Production data shows that on average 63.4% by weight of the feedstock of CO_2 Nielson supplies has been processed into liquid and dry ice products. Of the approximately 36.5% shrinkage between the inlet volume and plant products, approximately 4.5% consists of non-CO_2 impurities removed during processing with 32% being CO_2. Of the CO_2 shrinkage, 5.5% is returned to Nielson, with plant operations accounting for the remaining 26.5%.

C. Accounting and Payment Under the 1983 Agreement

The Agreement obligates Praxair to pay Nielson approximately $7.10 per ton of product shipped from the plant, adjusted annually to reflect market conditions. Liquid CO_2 and dry ice are shipped by trucks, which are weighed on certified scales connected to a computer that generates a delivery ticket for each shipment. Plant employees record shipments daily and generate a monthly "Production and Shipments Report" which details total

shipments of liquid CO_2 and dry ice. Praxair forwards the Production and Shipments Reports, together with the Delivery Tickets, to Nielson. The only measurement data Nielson relies on Praxair to provide is the volume by weight of products shipped from the plant and oxygen used in purification. The accuracy of measurement data that Praxair reports to Nielson is undisputed.

After receiving the Production and Shipments Report and support delivery tickets, Nielson invoices Praxair for the raw CO_2 gas delivered during the previous month based on the total shipments multiplied by the Agreement price. Praxair pays Nielson the amount invoiced.

The United States requires Nielson (and formerly Conoco), as lessees, to account for and pay royalties. Nielson determines the volume of royalty bearing gas according to the BLM-approved "plant tailgate" (product shipped) measurement (as outlined below). Nielson calculates the "sales quantity" by converting tons of CO_2 plant products to MCF and then the "royalty quantity" by applying the specified royalty rate. The reported "sales value" reflects gross proceeds under the Agreement allocated to each federal lease while the "royalty value" is determined by applying the specified royalty rate. Nielson pays royalties equal to the total "royalty value" of sales from the federal interests.

D. The Federal Royalty System

The Department of Interior ("DOI"), through the Minerals Management Service ("MMS") and the Bureau of Land Management ("BLM"), manages and protects the United States' mineral interests in federal leases, such as the federal leases Nielson has in the McCallum Fields.

Within DOI, BLM maintains responsibility for, among other things, approving the point of measurement for determining royalty bearing volumes of McCallum Fields gas, approving the venting (without royalty) of McCallum Fields gas, and ensuring that Nielson (and formerly Conoco) properly measures and reports gas produced from the McCallum Fields. The MMS has responsibility for determining the royalty value for gas produced from the McCallum Fields.

E. Government Approval of Nielson's Practices

Because the CO_2 was to be purchased from the plant tailgate, rather than the wellhead, and approximately 30% of the CO_2 was lost between the wellhead and the purchase point, Conoco requested approval of the Agreement by the BLM. The United States has known both the wellhead and royalty quantities, and the difference between them, since the mid-1980s, when Conoco began filing "Reports of Operations and Production" detailing gas volumes produced, sold and vented. The Department of Interior (through the BLM and the MMS) has been aware that substantial CO_2 from the McCallum field is vented without Nielson/Conoco paying royalty on the vented CO_2 since at least 1985.

On October 23, 1984, Conoco notified MMS of its Agreement with LCC. Conoco submitted the Agreement and an "Application for Establishment of Royalty Value" as well as a flow diagram noting gas flaring from LCC's plant. Conoco advised that it intended to calculate royalties based on proceeds received under the Agreement, at the prices negotiated, and on volumes determined by the amount of finished CO_2 products yielded by the raw gas

stream, as measured at the plant "tailgate." Conoco was not required to seek advance MMS valuation approval.

In mid-March, 1985, BLM wrote and called Conoco asking it to justify the LCC plant tailgate as an appropriate measurement location for royalty purposes. Conoco acknowledged BLM's plant loss concerns, but stated that Conoco believed the owners would benefit from the plant.

On April 4, 1985, the MMS approved CO_2 royalty values based on the arms-length contract price the parties had negotiated. The BLM approved Conoco's volume measurement and reporting methods.

The initial MMS audit of the McCallum Unit CO_2 production addressed concerns that the "majority of the CO_2 production was being vented from the plant." The MMS asked the BLM to provide a determination as to whether or not the venting of CO_2 could have been avoided. In response, the BLM explained that its conservation division had previously approved CO_2 venting, an approval the BLM did not want to rescind despite new CO_2 venting associated with the plant.

Subsequent audits or accountability inspections were conducted by the BLM in 1987, 1988, 1994, and 1996. In addition, the Colorado Department of Revenue Mineral Audit Section, on the DOI's behalf, audited Conoco's oil and gas production from 1992 through 1995. In all of these audits, it was noted that the volume of CO_2 at the wellhead was much greater than at the plant tailgate (where royalties were determined).

After the 1996 production accountability inspection, by mid-June 1996, the MMS was actively reviewing whether Conoco had properly paid royalties with respect

to the South McCallum Unit carbon dioxide and directing that Conoco recalculate, report and pay additional royalties. Conoco (and Nielson) faced, among other things, additional royalties and late payment charges. Nielson filed a Notice of Appeal with the MMS.

Following Nielson's appeal, BLM (at MMS direction) organized a meeting in Craig, Colorado, to investigate the tailgate measurement and shrinkage or loss of CO_2 at the plant. In addition to the BLM, Nielson and Praxair personnel, Mr. Ed Calvert from Nucor, attended the meeting. Nucor owns interests in certain of the McCallum Fields leases, but is otherwise unaffiliated with Nielson. Nielson handles the gas production and all royalty reporting and payment matters associated with the leases. Grynberg has not made any allegations against Nucor.

In an October 21, 1996 letter to the BLM, Nielson summarized the meeting and advised that "many of these plant processes use some of the CO_2, resulting in a 20-30% reduction in the eventual quantity of pure CO_2 available for sale." Nielson again requested approval (to the extent not previously approved) for royalty volume measurement at the plant outlet.

Based on its investigation, the BLM approved the plant tailgate measurement for all McCallum Fields CO_2 production (including the South McCallum Unit). To resolve any uncertainty, it made the approval retroactive to 1988 (when production from the South McCallum Unit began). The BLM understood that Praxair was paying Nielson, and that Nielson was paying royalties based on liquid CO_2 and dry ice volumes. The MMS thereafter withdrew its Order to Comply, closed Nielson's appeal, and declared Nielson to be in regulatory compliance.

Shortly after Grynberg filed his Complaint in 1998 (and apparently as a result of the Complaint), MMS yet again investigated the Agreement and Nielson's royalty payments. As before, MMS concluded that the Agreement is arm's-length, the base price received under it is acceptable for royalty purposes, and Nielson has properly paid royalties on the proceeds received.

Official representatives of both BLM and MMS have confirmed (under oath) their view that Grynberg's allegations against Nielson and Praxair regarding royalty underpayments are baseless.

The United States Attorney's office investigated Grynberg's allegations and determined them to be without factual support.

In June 2000, Nielson asked DOI to review and approve a follow-on Carbon Dioxide Purchase and Sale Agreement (the "Follow-On Agreement") between Praxair and Nielson that covers the McCallum Fields. The Follow-On Agreement largely mirrors the original arrangement, but reflects subsequent changes – changes that DOI has long known and approved of, but that Grynberg nevertheless complains about, *e.g.*, dry ice production. Nielson explicitly referenced Grynberg's FCA litigation in its cover letter seeking MMS review. Deborah Gibbs-Tschudy, Manager of the DOI, MMS, Royalty Management Program, again approved Nielson's royalty payment and measurement methods pursuant to the Follow-On Agreement (i.e., tailgate volumes and values based on contract proceeds). MMS found the Follow-On Agreement acceptable despite its specific recognition "that under normal operating conditions there may be significant and substantial losses of the CO_2 stream incurred in order to produce

finished product," and that these varying losses "may from time to time exceed fifty percent . . . of the CO_2 stream . . . delivered . . . to Praxair's Plant."

F. Grynberg's Investigation

Jack Grynberg is a petroleum engineer who is the president and co-owner of Grynberg Petroleum Company in Denver, Colorado. In 1997, Grynberg was trying to find a CO_2 supply for use in an oil field recovery project. One of the firms he called for prices was the Defendant, Praxair. Because Grynberg thought Praxair's prices were too high, he telephoned Jim Nielson, the President of Defendant, Nielson & Associates, Inc. Although Jim Nielson disputes Grynberg's version of the conversation, Grynberg alleges Jim Nielson complained that Praxair was taking 30 percent of the natural CO_2 produced from the McCallum Fields and using it as part of its processing operation without payment to Nielson. Grynberg also talked to Jim Williams, Nielson's chief operations officer, regarding the pricing arrangements between Nielson and Praxair. Based on these two brief telephone conversations, the contents of which are disputed, Grynberg claims to have begun an extensive investigation.

As part of his investigation, Grynberg filed a request under the Freedom of Information Act (FOIA) to acquire a copy of the Agreement between Praxair (formerly LCC) and Nielson (formerly Conoco) and other related documents, but his request for a copy of the Agreement was denied. Grynberg did receive four pages of a letter from the MMS to Conoco containing redacted information regarding the Agreement. Pet. App. 112a-115a.

Grynberg sent an employee to research the records at the Colorado Oil and Gas Conservation Commission "COGCC" office to learn the amount of Nielson's payment for conservation taxes on its CO_2 production. In addition, he referred to an industry publication of gas and oil production records. With these two public sources of information, Grynberg calculated Nielson's reported payments received for CO_2 and the royalties paid to the Government. Grynberg then made several phone calls inquiring about the reasonable market value of the CO_2 to end users and by visiting with operators of other plants. Grynberg also had one of his employees take pictures of the Praxair plant from a public road which showed that gas was being vented from the plant.

Grynberg concluded the volumes reported on Nielson's MMS forms 2014 and 3160 were fraudulent and did not reflect the actual gas production from the McCallum Fields, as Grynberg stated the MMS regulations require. While Grynberg conceded that the actual numbers reported to the Government throughout the life of the Agreement were accurate, he insisted the royalty submissions were knowingly false because Nielson and Praxair intentionally violated federal regulations by failing to pay royalties on wellhead production and by reducing the tailgate price through the deduction of processing costs.

II. PROCEDURAL BACKGROUND

On January 7, 1998, Grynberg filed a *qui tam* action under the False Claims Act, 31 U.S.C. §§3729 *et seq.*, against Nielson and Praxair. Grynberg claimed that Nielson and Praxair were liable under the so-called "reverse false claims" provisions of the False Claims Act,

namely 31 U.S.C. §3729(a)(7), for having made or caused to be made false records or statements for the purpose of decreasing royalty payments due under certain Federal leases in the McCallum fields. Grynberg claimed that both Defendants presented or caused to be presented false valuations of royalties owed to the Government for carbon dioxide production by understating the value of the CO_2 and by under-reporting the volume of the CO_2. *United States ex rel. Grynberg v. Praxair, Inc.*, 207 F.Supp.2d 1163 (D. Colo. 2001).

Defendants Nielson and Praxair filed separate motions for summary judgment. The district court granted summary judgment on the grounds that 1) there was no evidence to suggest either Defendant made "knowingly false" statements to the Government; 2) the court lacked subject matter jurisdiction because the *qui tam* action was based on publicly disclosed allegations or transactions; and 3) the claim was barred because it was premised on information known to the government prior to 1986. Both Nielson and Praxair moved for the payment of their attorney fees and costs. The district court ordered Grynberg to pay the Defendants' costs, but required each party to pay their own attorney fees. Nielson and Praxair both sought reconsideration of the district court's apportionment of attorney fees, maintaining that Grynberg's lawsuit was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" under 31 U.S.C. §3730(d)(4). The district court denied reconsideration. Grynberg appealed the dismissal of his claim, and Praxair cross-appealed the denial of its request for attorney fees and expenses.

The Tenth Circuit affirmed the district court's conclusion that Grynberg failed to establish subject matter jurisdiction. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004). The Tenth Circuit stated the transactions of Conoco and Nielson which Grynberg alleged were fraudulent were publicly disclosed twice. It was first publicly reported when the MMS sent its response to Grynberg's Freedom of Information Act ("FOIA") request and second, at a 1996 meeting to discuss the Order to Comply, where the subject of the administrative investigation was "publicly disclosed" to Ed Calvert. The court did not reach the remainder of the issues presented in Grynberg's appeal.

The Tenth Circuit reversed the denial of attorney fees to Praxair and remanded. It ruled that Praxair was the "prevailing party" in the case and, although the district court did not have subject matter jurisdiction over the FCA claims, concluded that it did have jurisdiction to award attorney fees under the fee-shifting provisions of 31 U.S.C. §3730(d)(4).

Nielson now requests that this Court deny certiorari to review the ruling of the Tenth Circuit Court of Appeals. Grynberg has cited no compelling reasons for a writ of certiorari to be granted, and the decision of the Tenth Circuit is sound and is well within the decisions of this Court.

ARGUMENT

I. THE JURISDICTIONAL BAR OF 31 U.S.C. §3730(e)(4)(A) APPLIES TO THE RELATOR'S COMPLAINT BECAUSE THE RELATOR HAS SOLELY RELIED ON OFFICIAL DOCUMENTS/ DECISIONS IN THE PUBLIC DOMAIN

In his first two arguments in his Petition for Writ of Certiorari, Grynberg argues that there is deep conflict among the circuit courts regarding the meaning of "public disclosure" in the False Claims Act, and what "based upon the public disclosure" actually requires.

Section 3730(e)(4)(A) states that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

What Grynberg sees as a conflict among the circuit courts is more a perception of how the statute is applied in differing factual situations. The Tenth Circuit in the instant case applied a well-respected course of reasoning when determining that not only were Grynberg's allegations in the public domain, but that Grynberg was not an original source.

Grynberg bears the "burden of alleging facts essential to show jurisdiction under the False Claims Act as well as supporting those allegations by competent proof." *United*

States ex rel. Holmes v. Consumer Ins. Group, 318 F.3d 1199, 1202 (10th Cir. 2003) (en banc) (quoting *United States ex rel. Fine v. Advanced Sciences, Inc.,* 99 F.3d 1000, 1004 (10th Cir. 1996).

Grynberg essentially complains in his Complaint that Nielson misreported for royalty purposes both the value and volume of CO_2 gas produced from Federal leases by relying on respectively, (i) the contract price Praxair paid rather than the market price for manufactured CO_2 products that Praxair sells, and (ii) plant tailgate volumes rather than wellhead volumes. Two public disclosures of these same transactions on which Grynberg's claims are based preclude FCA jurisdiction.

First, in response to a Freedom of Information Act request, Grynberg received pages from a 1985 MMS letter describing the Agreement between Conoco and LCC (See Pet. App. 112a-115a). These documents resulted from the MMS' administrative investigation triggered by Conoco's request that its arrangement with LCC be approved. As the Tenth Circuit noted, the FOIA documents described the essence of Grynberg's claims:

> While the information provided to Grynberg redacted the precise numbers, it revealed the existence of the Agreement, the point of production (the wellhead), the liquification of the CO_2 through Liquid Carbonic's plant while Conoco still maintained possession of the gas, the purchase point (the tailgate), and the fact the price was adjusted at the tailgate. Grynberg's claim that the document did not state where the royalty would be valued is disingenuous. While the letter does not recite those facts in Grynberg's preferred form, it is written by the entity required to make a valuation judgment and it identified the purpose

> of the correspondence is to "approve Conoco's 'production reporting sequence' for carbon dioxide (CO_2)" and the attached "Application for the Establishment of Royalty Values". . . . Further, the heading on the pages produced identifies the remainder of the document as "Findings and Conclusions on Valuation of CO_2." In this context, the document identifies the tailgate as the location of pricing and the fact the price will undergo adjustments. The only reasonable conclusion from these statements is that the royalty will be valued at the point of sale, and such location may entail a loss of value in the base amount used for royalty calculations. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004).

The Tenth Circuit in the instant case stated that "a response to a request under the Freedom of Information Act is generally considered to be a public disclosure." *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir. 1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997).

The description of this transaction in the FOIA documents provided to Grynberg undeniably presented the proposed CO_2 production reporting sequence in a "questioning light." Yet in his Petition for Writ of Certiorari, Grynberg complains that the FOIA document gave "no hint of fraud, because the sale price was redacted from the document, the failure to gross up the price was invisible, and the fact that gas was vented was contrary to what the FOIA document itself said." Yet this same publicly disclosed transaction triggered a government investigation into the very concerns that Grynberg raises. When this

arrangement was first revealed, MMS responded: "we are concerned that, if royalty is to be paid on the volume of gas leaving the plant, there could be significant differences, due to plant losses, from the volumes the [wellhead] allocation meters indicate." What was publicly disclosed, therefore, "detailed the mechanics of the practice" and "alerted the government" to the issues Grynberg presents. *See United States ex rel. Fine v. Sandia Corp.*,70 F.3d 568, 572 (10th Cir. 1999) where the publicly disclosed information "set the government squarely on the trail of the alleged fraud without [the relator's] assistance, . . . it would be contrary to the purposes of the FCA to exercise jurisdiction over his claim." *Id.* Moreover, Grynberg admitted reliance on this disclosure of the FOIA documents to develop his claims. The Tenth Circuit, in its decision, outlined how Grynberg provided these very documents to the Department of Justice as "material evidence and information . . . relating to the substantive issues alleged in the Complaint." While Grynberg alleged more detailed values and volumes, his claims are nevertheless based on the same publicly disclosed transactions. *See United States ex rel. Fine v. Advanced Sciences., Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996), where it was stated that there should be a dismissal under the public disclosure bar if "any part" of the action is "supported by" the publicly disclosed transactions (citing *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996) (jurisdictional bar not overcome merely through allegations "more narrow and specific in scope" than public disclosures).

A second public disclosure likewise bars jurisdiction. The MMS 1996 Order to Comply investigation included a meeting to discuss reliance on tailgate volumes. The meeting was initiated specifically to address concerns over wellhead volumes unaccounted for due to use of plant tailgate measurement for royalty reporting. BLM's concerns, its prior approvals, and Nielson's request to approve this practice for gas from a different field were specifically considered. Thus, the same transaction underlying Grynberg's claim regarding underreported gas volumes – reliance on tailgate rather than wellhead volume – was disclosed at that meeting. Grynberg has conceded that his claim mirrors the Order to Comply issues.

There was no genuine issue that the meeting was attended by Ed Calvert from Nucor. Grynberg questions Mr. Calvert's status, but does not carry his burden to prove that Mr. Calvert was anything other than a "stranger to the fraud," such that disclosure to him of this transaction triggers the "public disclosure bar." *Advanced Sciences,* 99 F.3d at 1005-06 (disclosure to one person unconnected with the fraud is sufficient). Mr. Calvert's employment by a company that invested in the leases Nielson operates does not make the disclosure non-"public" for FCA purposes. Nothing in the record suggests any connection between either him or his company and the alleged fraud. To the contrary, the evidence is uncontested that Nielson operates the CO_2 wells and handles all royalty matters Grynberg references Nucor's investment interest, but cites no facts linking its employee (Mr. Calvert) to any involvement in or knowledge of the matters at issue.

Grynberg promotes the mathematical formula espoused by the D.C. Circuit in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994),

in an attempt to prevail on the jurisdiction issue. Yet the Tenth Circuit states that even under the *Springfield* analysis, Grynberg fails to establish jurisdiction. Pet. App. 21a.

No matter what circuit court's reasoning he uses, Grynberg cannot withstand the jurisdictional bar because his complaint is clearly based upon the list of public disclosures outlined in 31 U.S.C. §3730(e)(4)(a) regarding the Nielson/Praxair Agreement.

II. A RELATOR MAY NOT BE AN ORIGINAL SOURCE UNDER 31 U.S.C. §3730(e)(4)(B) WHEN THE ONLY KNOWLEDGE HE HAS GAINED IS FROM PUBLIC SOURCES AND HE HAS NO DIRECT AND INDEPENDENT KNOWLEDGE OF THE INFORMATION

Section 3730(e)(4)(B) states:

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Faced with qualifying pre-filing public disclosures of the very transactions on which Grynberg's claims are based, FCA jurisdiction in this case depends on Grynberg's status as an "Original source." Unsurprisingly, Grynberg ignores *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 9 F.Supp.2d 1273 (D. Kan. 1998), *aff'd*, 190 F.3d 1156 (10th Cir. 1999). *Hafter* recognized the relator's burden to "allege specific facts – as opposed to mere conclusions –

showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged . . . and support those allegations with competent proof." *Id.* at 1162. Although repeatedly recounting his investigation, Grynberg does not allege, much less prove, any "direct and independent knowledge."

Grynberg describes conversations with various third parties, phone calls to Praxair salesmen, FOIA requests, review of state records and industry publications, observations from public roads, all culminating in personal speculation about regulatory requirements and prices based on bits of data and conjecture. But, Grynberg is not an "insider" and described no personal source of knowledge about any allegedly fraudulent practices. His efforts to construct a claim do not establish "original source" status. *See, e.g., Hafter D.O.,* 190 F.3d at 1162-63 (no particularized facts regarding fraud the relator witnessed); *M-K Ferguson,* 99 F.3d at 1548 (relator who neither observed nor discovered the alleged fraud was not an original source); *United States ex rel. Aflatooni v. Kitsap Physicians Services,* 163 F.3d 516, 526 (9th Cir. 1999) (conjecture and speculation does not suffice); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.,* 985 F.2d 1148, 1159 (2nd Cir. 1993) (background knowledge insufficient when relator was not source of core information underlying complaint).

The most Grynberg did was to pursue information from public sources after allegedly learning information from insiders (Jim Nielson and/or Jim Williams). Secondhand knowledge and research is not the "direct and independent knowledge" required to be an "original source." *United States ex rel. Devlin v. State of California,* 84 F.3d 358, 361 (9th Cir. 1996), *cert. denied,* 519 U.S. 949

(1996) (relators who learned of wrongdoing from an insider and then conducted investigation did not have "direct" knowledge because they "did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else, but derived it second-hand from Coty, who had firsthand knowledge"); *United States ex rel. Koerner v. Crescent City E.M.S., Inc.*, 946 F.Supp. 447, 453 (E.D. La. 1996) (relator who learned of alleged misconduct from defendant's former employee did not have "direct knowledge" because he was "neither a close observer of or otherwise involved in the fraudulent activity . . . ").

In addition, to avoid the jurisdictional bar, "before filing the *qui tam* action, a relator must voluntarily provide the Government with the essential elements or information on which the *qui tam* allegations are based." *United States ex rel. King v. Hillcrest Health Center, Inc.*, 264 F.3d 1271, 1280 (10th Cir. 2001); 31 U.S.C. §3730(e)(4)(B). Grynberg has not met his burden to demonstrate the requisite pre-filing disclosure. Only after filing did his lawyers transmit the complaint to the Government, along with "copies of all the material evidence and information" in his possession. Those transmittals do not indicate any prior communication with the Government about his allegation, but instead suggest that Grynberg had not previously provided the required information. No written corroboration of any prefiling disclosure exists.

Indeed, the Tenth Circuit points out that in Grynberg's disclosure to the Government, Grynberg's "total submission of evidence in support of his allegations included the 1985 MMS letter and two memos: one written by Grynberg approximating the cost for a CO2 plant in Cortez, Colorado, and another by his employee, comparing

the prices at the Cortez plant and those at Praxair." Pet. App. 24a.

The Tenth Circuit stated that the burden was on Grynberg to show he is an original source. *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 800-02 Fed. Appx. 708 (10th Cir. 2002). To meet this burden, he must provide more than an "unsupported, conclusory allegation." *Id.* at 800. "Grynberg is required to iterate specific facts demonstrating his direct and independent knowledge is marked by the absence of an intervening agency . . . [and] Unmediated by anything but [his] own labor." *Kennard,* 363 F.3d at 1044.

III. A COURT THAT LACKS SUBJECT MATTER JURISDICTION UNDER THE FALSE CLAIMS ACT STILL HAS JURISDICTION TO AWARD ATTORNEY FEES UNDER 31 U.S.C. §3730(d)(4)

IV. A DEFENDANT WHO PREVAILS IN A FALSE CLAIMS ACT CASE DUE TO LACK OF SUBJECT MATTER JURISDICTION OF THE RELATOR IS A "PREVAILING PARTY" UNDER 31 U.S.C. §3730(d)(4)

While Nielson has no stake in the arguments presented in Paragraphs III and IV herein, because it did not cross-appeal the attorney fee decision of the district court, Nielson asserts that Praxair is entitled to attorney fees as outlined by the Tenth Circuit, and adopts and endorses Praxair's arguments presented in its Brief in Opposition to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioner's Petition for a Writ of Certiorari should be denied because his complaints about the "deep conflicts among the circuits – conflicts which have persisted for years and which will not be resolved without the attention of this Court" are illusory when applied to the instant case.

Grynberg looks to the Court for a hard and fast rule which will save this opportunistic Plaintiff's case. The Tenth Circuit refused to "adopt any bright-line rule disqualifying a relator as an original source when the relator examines public records." *Grynberg*, *supra*, at Pet. App. 27a. The court noted that "it is the character of relator's discovery and investigation that controls this inquiry" about whether an individual is an original source under any particular set of facts. Courts which examine the provisions of the false claims act, and specifically the jurisdictional bars, face a mixed bag of law and fact which must be applied on a case by case basis according to the statute.

The Tenth Circuit, not only in *Grynberg*, but in other cases, has relied on the principle that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *Koch* at 552 (*citing F & S Construction Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964), "the Tenth Circuit has reasoned that its limited interpretation of who could sue under the statute protected the incentive for private citizens with first-hand knowledge to expose fraud, but also prohibited civil actions brought by opportunists who do not contribute anything significant to the exposure of the fraud." *United States ex rel. Findley, v. FPC-Boron Employees' Club, et al.*,

105 F.3d 675, 682 (D.C. Cir.), *cert. denied,* 522 U.S. 865 (1997).

United States Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for compelling reasons. The cases Grynberg cites do not show decisions in conflict with the decisions of another United States court of appeals on the same important matter as required by subsection (a) of that same rule; nor does it show an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court as required by subsection (c) of the rule. Furthermore, no matter which circuit court Grynberg had ended up in, he would not have qualified as an original source.

The Tenth Circuit in the instant case examined a mixed question of law and uncontroverted facts to determine what information was in the public domain as required by the False Claims Act to determine whether there was a jurisdictional bar, and then examined all the uncontroverted facts to determine whether this individual relator was an original source.

Grynberg believes that he can set the bar exceedingly low to qualify as an original source. This is not the case and should be rejected.

CONCLUSION

The Petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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